IN THE COURT OF APPEALS OF THE STATE OF ALASKA

PAUL NICOLI JR.,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-11779
Trial Court No. 3DI-11-47 CR

MEMORANDUM OPINION

No. 6147 — February 25, 2015

Appeal from the Superior Court, Third Judicial District, Dillingham, John W. Wolfe, Judge.

Appearances: Tracey Wollenberg, Assistant Public Defender, and Quinlan Steiner, Public Defender, Anchorage, for the Appellant. Eric A. Ringsmuth, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Craig W. Richards, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Hanley, District Court Judge.[*]

Judge ALLARD.

The superior court allowed Paul Nicoli Jr. to represent himself in a probation revocation proceeding without obtaining a knowing waiver of his right to

[*]Sitting by assignment made pursuant to Article IV, Section 16 of the Alaska Constitution and Administrative Rule 24(d).

counsel. The State concedes that the superior court failed to conduct the inquiries required for a valid waiver of this right — that is, the court failed to inform Nicoli of the benefits of counsel and the dangers of self-representation, failed to obtain an explicit waiver of his right to counsel, and failed to determine whether he was competent to proceed pro se. We conclude that the State's concessions of error are well-founded.[1]

Given the superior court's failure to conduct any of the required inquiries into Nicoli's decision to represent himself, and Nicoli's obvious confusion about his rights and the nature of the proceedings against him, we reverse Nicoli's probation revocation.

Factual background and prior proceedings

Following a jury trial, Paul Nicoli Jr. was convicted of second-degree assault and sentenced to 10 years with 5 years suspended.[2] The court imposed a special condition of probation requiring Nicoli to complete substance abuse treatment if it was available to him while he was in custody.

While Nicoli was still serving his sentence, the State filed an anticipatory petition to revoke his probation, alleging that he had refused to participate in an in-custody substance abuse treatment program. The State asked the court to anticipatorily revoke Nicoli's probation before he was released on mandatory parole and to impose all 5 years of his suspended time.

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[1] *Marks v. State*, 496 P.2d 66, 67-68 (Alaska 1972) (concessions of error by the State are entitled to great weight but must nonetheless be independently reviewed to ensure that they are supported by the record and have legal foundation).

[2] AS 11.41.210(a)(1); *see* AS 12.55.125(d) (providing for a presumptive range of 1 to 3 years for second-degree assault and a statutory maximum of 10 years).

When Nicoli was arraigned on the State's petition to revoke,[3] the court advised him that he was entitled to a court-appointed attorney and a hearing at which he could confront the State's witnesses. The court asked Nicoli if he wanted an attorney. When Nicoli did not answer, the court told him, "If you don't answer the question, I will presume you don't want an attorney."

At that point, Nicoli stated that asking for an attorney would imply his guilt. The court did not respond to this statement. Instead, the court set the case for an adjudication hearing and informed Nicoli, "At that time, if you don't have an attorney, you'll be representing yourself." The court also instructed Nicoli that if he changed his mind about having court-appointed counsel, he should file the necessary paperwork.

At the adjudication hearing about six weeks later, the following exchange occurred:

> *Court*: Mr. Nicoli, are you represented by counsel?
>
> *Nicoli*: No, I am representing myself.
>
> *Court*: Okay. All right.

There was no further discussion of Nicoli's legal representation.

Why we conclude that a reversal is required in this case

Under Alaska law, a defendant is entitled to the assistance of counsel in defending against a petition to revoke probation.[4]

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[3]The arraignment was recorded at the wrong sampling rate and could not be transcribed. An enhanced version of the audio was prepared by IMIG Audio/Video, Inc. The Court has reviewed this enhanced version and agrees that it is sufficient for purposes of this appeal.

[4]AS 12.55.110(a) ("In all proceedings for the revocation of a suspended sentence, the defendant is entitled to reasonable notice and the right to be represented by (continued...)

In *James v. State*, we recognized that "[e]xcept in the most unusual circumstances, a trial in which one side is unrepresented by counsel is a farcical effort to ascertain guilt."[5] Accordingly, a defendant who wishes to waive his right to counsel and represent himself must "unequivocally declare[] his or her intention to appear pro se."[6] The court must then conduct a thorough inquiry into the circumstances surrounding that request, to ensure that the defendant knowingly waives his right to counsel and is competent to proceed pro se.[7] As the Alaska Supreme Court stated in *McCracken v. State*, the court must explain "the advantages of legal representation ... in some detail."[8] The defendant should also be warned of the dangers of self-representation, "so that the record will establish that he knows what he is doing and his choice is made with eyes open."[9] The court must also establish that the defendant is "capable of presenting his allegations in a rational and coherent manner" and is "willing to conduct himself with at least a modicum of courtroom decorum."[10]

Following these inquiries, the court should appoint counsel "unless the defendant demonstrates that he understands the benefits of counsel and knowingly

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[4](...continued)
counsel."); *Hoffman v. State*, 404 P.2d 644, 646 (Alaska 1965).

[5]*James v. State*, 730 P.2d 811, 814 n.1 (Alaska App. 1987) (quoting the Commentary to 1 ABA Standards for Criminal Justice § 6–3.6, at 6.39–40 (2d. ed.1982)).

[6]*Id.*

[7]*McCracken v. State*, 518 P.2d 85, 91-92 (Alaska 1974).

[8]*Id.* at 92.

[9]*James*, 730 P.2d at 814 n.1 (quoting the Commentary to 1 ABA Standards for Criminal Justice § 6–3.6, at 6.39–40 (2d. ed.1982)).

[10]*McCracken*, 518 P.2d at 92.

waives the same."[11] Because the right of an accused to be represented by counsel is so fundamental, this inquiry should be on the record.[12]

None of these inquiries took place in this case. The court did not advise Nicoli of the benefits of counsel and the risks of self-representation, nor did the court correct Nicoli's apparent belief that to ask for counsel would "imply guilt." The court also failed to make any determination that Nicoli was competent to represent himself. Instead of obtaining a knowing and voluntary waiver from Nicoli of his right to counsel, the court placed the burden on Nicoli to affirmatively assert the right to counsel. Nicoli was then permitted to represent himself at a probation revocation hearing at which he faced the imposition of 5 years of suspended jail time.

Although the State concedes error, it argues that the proper remedy is to remand the case to the superior court so the court can supplement the record with its understanding of Nicoli's decision to represent himself. The State points out that the judge had earlier allowed Nicoli to represent himself in the appeal of his underlying second-degree assault conviction, and that the judge may have believed that any additional warnings and inquiries were unnecessary or futile.

But the fact that a defendant knowingly and intelligently waived his right to counsel in one case does not relieve a court of its duty to conduct the requisite on-the-record inquiry in a different case — nor does it alter the rule that a defendant who is

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[11] *Id.* at 91-92 (citations omitted).

[12] *See O'Dell v. Anchorage*, 576 P.2d 104, 107-08 (Alaska 1978) (citing *Gregory v. State*, 550 P.2d 374, 379 (Alaska 1976)); *Faretta v. California*, 442 U.S. 806, 835 (1975)). We excuse a court from conducting an on-the-record inquiry into a defendant's decision to represent himself only if "the record as a whole unequivocally demonstrate[s] a full awareness ... of the benefits of counsel and the dangers of self-representation." *Gladden v. State*, 110 P.3d 1006, 1010 (Alaska App. 2005) (quoting *Evans v. State*, 822 P.2d 1370, 1374-75 (Alaska App. 1991)). Here, the record provides no such assurances.

entitled to counsel must be represented by counsel unless the defendant affirmatively waives that right after receiving the requisite warnings.[13]

Accordingly, we reverse the superior court's judgment and remand this case for a new adjudication hearing. On remand, the superior court may not allow Nicoli to proceed without counsel unless the court finds that Nicoli has knowingly and intelligently waived his right to counsel and is competent to represent himself in the revocation proceeding.

Conclusion

We REVERSE the judgment of the superior court and REMAND for further proceedings consistent with this decision. We do not retain jurisdiction.

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[13]We also note that, by the time of Nicoli's arraignment on the petition to revoke his probation, this Court had rescinded Nicoli's right to represent himself in the appeal of his underlying criminal case, finding that he was "not capable of making a coherent and intelligible presentation of his case."